



HOME

ABOUT THE FIRM ▼

ATTORNEYS

PRACTICE AREAS ▼

CLIENT PAYMENTS

CONTACT US ▼

THE COLUMN CONTACT Q



It's Official: The Statute of Limitations Was Tolloed, Not Suspended, During the COVID-19 Pandemic



By Jarrett M. Behar

Now that the Spring of 2023 is almost upon us, no one wants to think back to the time during the height of the COVID-19 Pandemic. That includes the various Executive Orders issued by then-Governor Cuomo extending the expiration of statutes of limitations between the 228-day period of March 20, 2020 and November 3, 2020 (9 N.Y.C.R.R. 8.202.8, 8.202.67). Those Executive Orders led to the question of whether the statute of limitations was simply suspended during that period or tolled. The difference being that a suspension does not exclude its effective duration from the calculation of the relevant time period and a toll does.

On June 2, 2021, the Appellate Division, Second Department issued its decision in *Brash v. Richards*, 195 A.D.3d 582 [2d Dep't 2021], which held that Governor Cuomo had the authority to issue a toll and that the thirty day period from which to

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Awards
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take an appeal that would have expired during the pendency of the Executive Orders was tolled such that the appellant had 30 days from November 3, 2020, the end of the Executive Order period, to file its notice of appeal. *Id.* at 583. In the wake of *Brash*, however, there was an open question as to whether its holding was limited to time periods that would have expired during the Executive Order period. See, e.g., *Baker v. 40 Wall Street Holdings Corp.*, 74 Misc.3d 381, 383 [Sup Ct. Kings County 2022]; *Cruz v. Guaba*, 74 Misc.3d 1207(A), 2022 N.Y. Slip. Op. 50077(U) [Sup. Ct. Queens County Feb. 7, 2022]; *Barry v. Royal Air Maroc*, 2022 WL 3215050, at *4 [S.D.N.Y. July 8, 2022], *adopted*, 2022 WL 3214928 [S.D.N.Y. Aug. 9, 2022].

Earlier this month, the Second Department put that argument to bed when it issued its decision in *McLaughlin v. Snowlift, Inc.*, 2021-05769, ___ A.D.3d ___ [2d Dep't Mar. 8, 2023]. In *McLaughlin*, in affirming the denial of a motion to dismiss on renewal after the initial motion was granted pre-*Brash*, the Second Department unequivocally stated that its decision in *Brash v. Richards* conclusively "held that the executive orders 'constitute a toll' of the filing deadlines applicable to litigation in New York Courts." In addition, the Second Department cited to analogous decisions in the Appellate Division, First Department (*Murphy v. Harris*, 210 A.D.3d 410 [1st Dep't 2022]) and Third Department (*Roach v. Cornell University*, 207 A.D.3d 931 [3d Dep't 2022]). Thus, with the unanimity among the various Departments, it appears unlikely that this issue will reach the Court of Appeals or that, if it did, a contrary result would be reached.

As a result, any statute of limitations that began to run and did not expire prior to March 20, 2020 will have 228 days added on to it. Any statute of limitations that began to run during that tolling period will have the amount of days between the date of accrual and November 3, 2020 added on to it. So, for example, the six-year statute of limitations for a breach of contract action that accrued on March 19, 2020, will now not expire until after November 2, 2026. In addition to generally extending the statute of limitations, the tolling also significantly affects document and electronically stored information retention policies, which should now be extended to compensate for the extended time period under which liability can now be sought. For potential litigants, the finding that the Executive Orders definitively constitute a toll is just another way that the COVID-19 Pandemic will continue to linger.

Jarrett M. Behar is Co-Chair of the Litigation Group at Certilman Balin Adler & Hyman, LLP.

PREVIOUS

Islam joins Real Property Tax Certiorari Law an...

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NEXT

Welcome

Archives

August 2023

June 2023

May 2023

March 2023

February 2023

January 2023

December 2022

November 2022

September 2022

August 2022

July 2022

June 2022

May 2022

April 2022

March 2022

February 2022

January 2022

October 2021

August 2021

June 2021

May 2021

March 2021

February 2021

January 2021

November 2020

- October 2020
- September 2020
- August 2020
- July 2020
- June 2020
- May 2020
- April 2020
- March 2020
- June 2019
- May 2019
- April 2019

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- Home
- About the Firm
- Practice Areas
- Attorneys
- Diversity Statement
- Website
- Accessibility

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No. 202.67

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws
Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby find that a disaster continues to exist for which affected state agencies and local governments are unable to respond adequately. Therefore, pursuant to the authority vested in me by the Constitution of the State of New York and Section 28 of Article 2-B of the Executive Law, I hereby continue the declaration of the State Disaster Emergency effective March 7, 2020, as set forth in Executive Order 202. This Executive order shall remain in effect until November 3, 2020.

IN ADDITION, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202 up to and including 202.21, and 202.27, 202.28, 202.29, 202.30, 202.38, 202.39, 202.40, 202.48, 202.49, 202.50, 202.55 and 202.55.1, as extended, and Executive Order 202.60 for another thirty days through November 3, 2020, except:

- Subdivision 1 of Section 491 of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a non-driver identification card, shall no longer be suspended or modified as of November 3, 2020;
- Sections 401, 410, 2222, 2251, 2251, and 2282(4) of the Vehicle and Traffic law, to the extent that it provides for a period of validity and expiration of a registration certificate or number plate for a motor vehicle or trailer, a motorcycle, a snowmobile, a vessel, a limited use vehicle, and an all-terrain vehicle, shall no longer be suspended or modified as of November 3, 2020;
- Section 420-a of the Vehicle and Traffic law, to the extent that it provides an expiration for temporary registration documents issued by auto dealers shall no longer be suspended or modified as of November 3, 2020; and
- The suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule,

or regulation, or part thereof, is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be tolled, and provided further:

- o The suspension and modification of Section 30.30 of the criminal procedure law, as continued and modified in EO 202.60, is hereby no longer in effect, except for felony charges entered in the counties of New York, Kings, Queens, Bronx, and Richmond, where such suspension and modification continues to be effective through October 19, 2020; thereafter for these named counties the suspension is no longer effective on such date or upon the defendant's arraignment on an indictment, whichever is later, for indicted felony matters, otherwise for these named counties the suspension and modification of Section 30.30 of the criminal procedure law for all criminal actions proceeding on the basis of a felony complaint shall no longer be effective, irrespective, 90 days from the signing of this Executive order on January 2, 2021.



GIVEN under my hand and the Privy Seal of the

State in the City of Albany this fourth
day of October in the year two
thousand twenty.

BY THE GOVERNOR

A handwritten signature in black ink, appearing to be "Mr. C.", written over a horizontal line.

Secretary to the Governor

A handwritten signature in black ink, appearing to be "Andrew Cuomo", written over a horizontal line.